Dec. 18. Judy Day

18-589

AMENDMENT TO RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 652.

JOHN R. BULLARD, TRUSTEE OF EDMUND W. CLAP, A BANKRUPT, PLAINTIFF IN ERROR,

vs.

THE NATIONAL EAGLE BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED NOVEMBER 12, 1873. AMENDED RECORD FILED DECEMBER 11, 1873.

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1 UNITED STATES, *ss:*

[SEAL.] The President of the United States to the judges of the circuit court, holden in and for the district of Massachusetts, greeting:

Because, that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between John R. Bullard, trustee, plaintiff, and the National Eagle Bank, defendant, in a plea of the case, a manifest error has intervened to the great damage of the said plaintiff, as in his complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that, if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States, on the second Monday of October next, at Washington,
2 being the present seat of the National Government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Nathan Clifford, Senior Associate Justice of the said Supreme Court, at Washington aforesaid, this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

JOHN G. STETSON, *Clerk.*

Allowed by—

G. F. SHEPLEY,
U. S. Circuit Judge First Judicial Circuit.

UNITED STATES OF AMERICA:

Circuit court of the United States, district of Massachusetts, ss:

And now here the judges of the circuit court of the United States, in and for said district, make return of this writ by annexing hereto and sending herewith, under the seal of said circuit court, as within
3 commanded, a true and certified copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof I hereunto set my hand and affix the seal of said court at Boston, in said district, this eighth day of November, A. D. 1873.

[SEAL.] JOHN G. STETSON, *Clerk.*

4 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States, begun and holden at Boston, within and for the district of Massachusetts, on Tuesday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy three.

Present, the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, assigned to the first circuit, and the honorable George F. Shepley, circuit judge.

JOHN R. BULLARD, TRUSTEE, PLAINTIFF,
v.
THE NATIONAL EAGLE BANK, DEFENDANT.

The writ in this case, in the words and figures following, namely:

MASSACHUSETTS DISTRICT, *ss:*

[L. S.] The President of the United States of America to the marshal of our district of Massachusetts, or his deputy, greeting:

We command you to attach the goods or estate of the National Eagle Bank, a corporation organized under and by virtue of the statutes of the United States, and having its place of business in Boston, in our district of Massachusetts, to the value of thirty thousand dollars, and summon the said corporation to appear (if it may be found in your district) before our judges of our circuit court of said United States, for the first circuit next to be holden at Boston, within and for our said district of Massachusetts, on the third Tuesday, to wit, the fifteenth day of May, 1872, then and there, in our said court, to answer unto Chester I. Reed, of Dedham, in our said district, as he is trustee in bankruptcy, and under the provisions of the bankrupt laws of the United States, of Edmund W. Clap, of Walpole, in our said district, and doing business under the firm and style of Clap and Brother, in a plea of the case.

To the damage of the said plaintiff, in his said capacity, as he says, the sum of thirty thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness the honorable Nathan Clifford, at Boston, the thirtieth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

JOHN G. STETSON, *Clerk.*

This writ was duly entered at the May term of this court, A. D. 1872, when and where the parties appeared by their respective attorneys, and thence the cause was continued to the October term of this court, A. D. 1872, when, to wit, December 11th, 1872, the following agreed statement of facts were filed, namely:

Agreed statement of facts.

Samuel G. Clap and Edmund W. Clap were partners doing business as merchants in Boston, under the firm of Clap & Brother, from 1860 to the 16th day of March, 1870, when said Samuel died. Edmund thereafter carried on business in the firm-name. On the 8th day of November, 1871, he failed to pay his commercial paper maturing on that day.

On a petition filed by one of his creditors in the district court for said district, on the 12th day of January, 1872, he was, on the 19th day of that month, adjudged a bankrupt for the above cause. On the 10th day of February the plaintiff was duly appointed trustee of the said bankrupt, who, on that day, conveyed and assigned to the plaintiff all his property, real and personal.

While said Samuel and Edmund were so partners, to wit, on the 1st day of August, 1865, and on the 13th day of February, 1866, they bought and had duly transferred to them one hundred and sixty shares of the capital stock of the defendant bank, one hundred and forty-five

thereof on said 1st day of August, and fifteen thereof on said 13th day of February. These shares have ever since remained in certificate, and on the books of the bank, in the name of Clap & Brother.

The defendant bank was organized under the statutes of the United States on the 29th day of March, 1865, as appears by the articles of association, a copy whereof, marked A, is hereto annexed, and made a part thereof.

Said bank, by its directors, enacted and adopted the by-laws, a copy of the record whereof, marked B, is hereto annexed and made a part thereof. The directors had been informed, before adopting either of said by-laws, that said Edmund had stopped payment.

Said bank, on said 8th day of November, held and ever since has held commercial paper discounted by it for the accommodation of said Edmund, copies of which, severally marked C, D, E, F, G, H, and I, are annexed hereto and made a part hereof. No part of this paper has been paid, and said Edmund was and still is liable for the payment thereof.

The plaintiff, on the 15th day of February, 1872, demanded of the defendant a transfer to him, as such trustee, of said one hundred and sixty shares of stock, and the defendant refused to make such transfer, or allow the same to be made, claiming to have a lien on said shares to secure the payment of said paper.

When said Samuel died said firm had property to a large amount, and were largely indebted. Their creditors required the plaintiff to appropriate the said shares, and any other property of the firm, and the proceeds thereof, to the payment in full of the debts of the firm, before applying any part thereof to the payment of any debts due and owing from said Edmund. The debts of the firm were paid in part by the said Edmund, and have been in part paid by the plaintiff from the proceeds of the firm's property which have come into his hands as trustee. And the plaintiff has now in his hand the proceeds of said firm's property, sold by him, more than sufficient to pay in full all the outstanding debts of the firm. It is claimed by the one party that the estate of the said Samuel is indebted to said Edmund, and on the other that said Edmund is indebted to said estate. If material, the question shall be determined by a master. Unless upon the foregoing fact said bank is entitled to a lien upon said shares of stock or some portion of them, for the indebtedness aforesaid, judgment shall be for the plaintiff for the value thereof, to be ascertained by an assessor, and for the unpaid dividends and interest.

And if said bank is entitled to a lien on said shares, or any part thereof, the defendant is to hold the same until the debt shall be paid.

The costs to be paid as the court shall order.

The will of S. G. Clap is hereto annexed, and may be referred to.

CHESTER I. REED,
H. W. PAINE,
For Nat. Eagle Bank.

6 A.

Articles of association.

We, the undersigned, the directors of the Eagle Bank, Boston, in the State of Massachusetts, having been authorized by the owners of two-thirds of the capital stock of said bank, to change and convert the said bank into a national banking association, under and according to the

provisions of the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and to execute articles of association, do hereby, in our own behalf, and in behalf of the stockholders whom we represent, make and execute the following articles of association:

1st. The name and title of the association into which the said Eagle Bank is to be changed and converted, shall be the National Eagle Bank of Boston.

2d. The place where its banking-house or office shall be located, and its operations of discount and deposit carried on, and its general business conducted, shall be the city of Boston, in the county of Suffolk, and State of Massachusetts.

3d. The board of directors shall consist of not exceeding nine stockholders. The regular annual election of directors shall be held on the second Tuesday of January of each year, but if no election shall be held on that day, it may be held on any other day, according to the provisions of the tenth section of the act; and all elections shall be held according to such regulations as may be prescribed by the board of directors of the association, not inconsistent with the provisions of the aforesaid act.

4th. The capital stock of this association shall be ten hundred thousand dollars, to be divided into shares of one hundred dollars each; but the capital may be increased, according to the provisions of the thirteenth section of the act, to any sum not exceeding fifteen hundred thousand dollars; and in case of the increase of the capital of the association, each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to, according to the number of shares owned by him, before the stock is increased.

5th. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold his office (unless he shall become disqualified, or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director; and they shall have power to elect a vice-president, who shall also be a member of the board of directors; and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them, and continue them in office, or to dismiss them, as, in the opinion of a majority of the board, the interests of the association may demand. They shall also have power to define the duties of the officers and clerks of the association; to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made;
7 and generally to do and perform all the acts that it may be legal for a board of directors to do under the act aforesaid. And they shall also have the power to make all by-laws that it may be proper and convenient for them to make, under said act, for the general regulation of the business of the association, and the entire management and administration of its affairs; which by-laws may prohibit, if the directors so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal debtor or otherwise, without the consent of the board.

6th. This association shall continue for the period of twenty years

from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements, and provisions of the act.

7th. These articles of association may be changed or amended at any time by stockholders owning a majority of the stock of the association, in any manner not inconsistent with the provisions of the act; and the board of directors, or any three stockholders, may call a meeting of the stockholders for this purpose.

In witness whereof we, the directors aforesaid, for ourselves as such directors, and in behalf of the stockholders of the Eagle Bank, Boston, have hereunto set our hands this twenty-ninth day of March, eighteen hundred and sixty-five.

(Signed) WALDO FLINT.
W'M ALMY.
MORTIMER C. FERRIS.
GEORGE H. GRAY.
JAMES L. LITTLE.
GEO. WOODS RICE.
JACOB C. ROGERS.
AUSTIN SUMNER.
BENJ. THAXTER.

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

On this, the twenty-ninth day of March, A. D. 1865, personally came before me, a notary public of said county, Waldo Flint, William Almy, Mortimer C. Ferris, George H. Gray, James L. Little, George Woods Rice, Jacob C. Rogers, Austin Sumner, and Benjamin Thaxter, directors of the Eagle Bank, Boston, to me well known, who severally acknowledged that they executed the foregoing articles of association for the purposes and uses therein mentioned.

Witness my hand and seal of office the day and year aforesaid.

(Signed) EDWARD A. DEXTER,
Notary Public.

I certify that the articles of association of the National Eagle Bank of Boston were executed in duplicate, and that one of the instruments so executed is the foregoing; and that the other, in all respects like the foregoing, and stamped in the same manner, is on file with said bank.

(Signed) WALDO FLINT,
President.

Dated Boston, March 29th, 1865.

B.

Meeting of the directors.

Nov. 22, 1871.—Present, R. S. Covell, Isaac W. Danforth, G. Woods Rice, F. Almy, M. C. Ferris.

8 Mr. Isaac W. Danforth proposed an amendment to article 15 of the by-laws of the National Eagle Bank, which was referred to next meeting of the board; and at next meeting, Nov. 25th, 1871, (present, Covell, Almy, Danforth, Little, Rice, Rogers,) Mr. Danforth moved the adoption of the following by-law:

"In pursuance of one of the articles of association, and to carry the same into effect, and in the exercise of an authority conferred by an act under which the bank was organized, to define and regulate the manner in which its stock shall be transferred, it is hereby declared, all debts actually due and payable to the bank (days of grace for payment being passed) by a stockholder as principal debtor or otherwise, requesting a transfer, must be satisfied before such transfer shall be made, unless the board of directors shall direct to the contrary."

On motion of Mr. Rice, voted that a by-law proposed by Mr. Danforth for consideration, be, and the same is hereby, adopted and declared as one of the by-laws of the association.

DECEMBER 7, 1871.—Directors present, Messrs. Covell, Almy, Danforth, Ferris, Little, Rice, and Rogers.

Mr. Danforth moved, as an amendment to the by-law proposed by him Nov. 22d, to add these words:

"And no person indebted to the bank shall be allowed to sell or transfer his or her stock without the consent of a majority of the directors, and this whether liable as principal or surety, and whether the debt or liability be due or not." Voted unanimously.

Will of Samuel G. Clap.

* * * * * * *

Third. I give the residue, including the reversion of the house so given to my wife, of all the estate of which I shall be possessed at my decease, to my brother, Edmund W. Clap, forever, in trust, for the uses hereinafter set forth. The said Edmund is authorized to sell the same at his discretion, the purchaser not responsible for the application of the purchase-money, with power to invest and re-invest the proceeds, and hold the same in the trust as aforesaid.

Fourth. I give to my wife, during her life, one-third of the rents, interest, and income, less all lawful charges thereon, which may be derived from the property so as aforesaid given to my brother in trust, as her sole and separate estate, her receipt therefor, not by way of sale or anticipation, to be a discharge, notwithstanding her future coverture, from which one-third is to be deducted, a sum with which to pay taxes, insurance, and ordinary repairs, the use of which is, as above, given to her.

Fifth. I give to my daughter Louisa, during her life, one-half of the income, subject to the provisions for my wife in such income, which may be derived from the property above given to my brother in trust, as her sole and separate estate.

* * * * * * *

Tenth. I appoint my brother, Edmund W. Clap, executor, and as such, and as trustee, he is released from giving bond with surety.

Eleventh. My brother is authorized to employ and use in his business the estate and property herein given to him in trust, or any part thereof, before the same shall be required for distribution, charging himself with interest therefor at six per cent. per annum.

* * * * * * *

9 C.

$4,000.] MEDINA, N. C., *July* 21*st*, 1871.

Four months after date we promise to pay to the order of Clap & Brother four thousand dollars, at any bank in Boston, value received.

[Stamp, 2.00.]

DELANO BROTHERS.

(Written on face in red ink:) Pub. Nov. 24, '71. Notice to parties. A. W. A., not. pub. 2.00; .25—2.25.
(Endorsed:) CLAP & Bro., p'r W. GLOVER, *Att'y.*

D.

$1,900.] DETROIT, *Aug't 21st*, 1871.

Three months after date we promise to pay to the order of Clap & Bro. nineteen hundred dollars, at office Clap & Bro., Boston, Mass., value received.

M. JOHNSON & SON.

[Stamp, 95c.]

(Written on face in red ink:) Pub. Nov. 24, '71. Notice to parties. A. W. A., not. pub. Fees, 2.00; .25—2.25.

(Endorsed:) Clap & Bro.

E.

$3,500.] ROCHESTER, N. Y., *Aug.* 8, 1871.

Four months after date I promise to pay to the order of Clap & Brother thirty-five hundred dollars at their office in Boston, value received.

JAMES CONOLLY.

(Written on face in red ink:) Pub. Dec. 11, '71. Notice to parties. A. W. A., not. pub. Fees, 2.00; .25—2.25.

(Endorsed:) Clap & Bro.

F.

$2,134.56.] BOSTON, *Sept. 16th*, 1871.

Three months after date I promise to pay to the order of Clap and Brother twenty-one hundred thirty-four $\frac{56}{100}$ dollars, value received.

NATHANIEL BLANCHARD.

(Endorsed:) Waiving demand and notice.

CLAP & BRO.,
P'r W. GLOVER, *Att'y.*

10 G.

$926.19.] NEW YORK, *Sept. 26th*, 1871.

Three months after date I promise to pay to the order of Clap & Bro. nine hundred and twenty-six $\frac{19}{100}$ dollars, at Eagle Bank, in Boston.

GEO. W. BARNEY.

[Stamp, 50c.]

(Written on face in red:) Pub. Dec. 29, '71. Notice to parties. A. W. A., not. pub. Fees, 2.00; .25—2.25.

(Endorsed:) CLAP & BRO., by W. GLOVER, *Atty.*

H.

$4,000.] MIDDLEPORT, N. Y., *Oct. 6th*, 1871.

Three months after date pay to the order of myself four thousand dollars, value received, and charge the same to account of

C. H. FRANCIS.

To CLAP & BRO., *Boston.*

[Stamp, 2.00.]

(Written across the face in black:) Clap & Bro., per W. Glover, att'y.

(Written on the face in red:) Pub. Jan'y 9, '72. Notice to parties. A. W. A., not. pub. Fees, 2.00; .25; .03—2.28.

(Endorsed:) C. H. FRANCIS.

I.

$3,000.] MIDDLEPORT, N. Y., *Sept. 20th*, 1871.

Four months after date we promise to pay to the order of Mess. Clap & Bro. three thousand dollars, at any bank in Boston, Mass.

DELANO & BROTHER.

[Stamp, 1.50.]

(Written on face in red:) Pub. Jan'y 23, '72. Notice to parties. A. W. A., not. pub. Fees, 2.00; 25; 02;—2.27.

(Endorsed:) CLAP & BRO., p'r W. GLOVER, *Att'y.*

I.—Continued.

$3,000.] MIDDLEPORT, N. Y., *Sept.* 29, 1871.

Four months after date pay to the order of yourselves three thousand dollars, value received, and charge the same to account of

A. S. DELANO.

To CLAP & BROTHER, *Boston.*

[Stamp, 1.50.]

(Written across the face in black:) Clap & Bro., per W. Glover, att'y.

(Written on face in red:) Pub. Feb'y 1, '72. Notice to parties. A. W. A., not. pub. Fees, 2.00; .25—2.25.

(Endorsed:) CLAP & BRO., p'r W. GLOVER, *Att'y.*

11 I.—Continued.

$3,000.] ROCHESTER, N. Y., *Oct. 12th*, 1871.

Four months after date pay to the order of myself three thousand dollars, value received, and charge the same to account of

JAS. CONOLLY.

To CLAP & BRO., *Boston.*

[Stamp, 1.50.]

(Written across the face in red:) Pub. Feb'y 15, '72. Notice to parties. A. W. A., not. pub. Fees, 2.00; .25; .03—2.28.

(Endorsed:) JAS. CONOLLY.

This cause was thence continued to the present term, when, to wit, September 27, 1873, the death of Chester I. Reed, the plaintiff in this cause, is suggested, and it being made to appear to the court that John R. Bullard, of Dedham, in this district, has been appointed as the successor of said Chester I. Reed, trustee in bankruptcy of the estate of said Edmund W. Clap, the said John R. Bullard, as he is trustee as aforesaid, is, with the leave of court, permitted to appear as party plaintiff in this suit; and the following amendment of the agreed statement of facts is filed, namely:

Amendment of the agreed statement of facts.

It is agreed that two of the notes held by the National Eagle Bank matured, days of grace having expired on 24th November, 1871. Amount	$5,700
Four matured between December 11th, 1871, and January 9th, 1872, inclusive. Amount	10,560 75
Three notes matured subsequent to the 12th of January, 1872, the last on the 15th of Feb'y 1' —$3,000 each. Amount	9,000 00
	$25,260 75

Sept. 27th, 1873.

C. B. GOODRICH,
For Def'ts.
JOHN R. BULLARD,
For Pl'ff.

12 This cause came on to be argued at this present term before the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, and the honorable George F. Shepley, circuit judge; and now, to wit, October 10, 1873, after due deliberation thereon had, the court sustains the claim of the defendant.

It is thereupon considered by the court that the said National Eagle Bank, defendant, recover of the said John R. Bullard, trustee, plaintiff, its costs of suit taxed at fourteen dollars and twenty-nine cents, ($14.29.)

Upon the entry of said judgment in this cause, the following certificate was filed, namely:

Circuit court of the United States, district of Massachusetts. May T., 1873.

JOHN R. BULLARD, TRUSTEE, PLAINTIFF,
v.
THE NATIONAL EAGLE BANK, DEFENDANT.

This cause coming on to be heard, the following questions were raised and argued: First. Whether a national bank organized under and controlled by the act of 1864, can acquire a valid lien upon the shares
13 of its stockholders by the articles of association or by-laws, as proved in this case.

Second. Whether if such articles of association and by-laws, or both, created any valid lien upon the shares of the stockholders in a national bank organized under the act of 1864, such lien attached to the shares before the time when there was an existing debt, from the stockholders to the bank, due and unpaid.

Third. Whether the National Eagle Bank, upon the facts agreed, is entitled to hold the interest of Edmund W. Clap in the stock therein mentioned, by way of lien or security for all or any of the notes and bills mentioned in the facts agreed.

Whereupon, at the request of the plaintiff, to wit, October 10th, 1873, the judges before whom said cause was heard, certify in accordance with the act of Congress of June 1st, 1872, that they differed in opinion as to the foregoing questions which, under the act of Congress of April 29th, A. D., 1862, might have been reviewed by the Supreme Court of the United States on certificate of difference of opinion.

NATHAN CLIFFORD, [SEAL.]

14 *Associate Justice of the Supreme Court of the United States.*

G. F. SHEPLEY, [SEAL.]

U. S. Circuit Judge First Judicial Circuit.

UNITED STATES OF AMERICA,
District of Massachusetts:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the certificate of division of opinion filed in the foregoing-entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of said court at Boston, in said district, this eighth day of November, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

[SEAL.] JOHN G. STETSON, *Clerk.*

15 Supreme Court of the United States, October term, 1873.

JOHN R. BULLARD, TRUSTEE OF E. W. CLAP, a bankrupt, plaintiff,
vs.
THE NATIONAL EAGLE BANK. } No. 652.

It is hereby agreed that the transcript of record hereto attached be substituted for the transcript now on file in the above-entitled cause.

B. R. CURTIS,
Of Counsel for Bullard, Trustee.
C. B. GOODRICH,
Of Counsel for Nat'l Eagle Bank.

Filed 11th December, 1873.

Supreme Court of the United States.

October Term, 1873.

BULLARD, TRUSTEE,

vs.

THE NATIONAL EAGLE BANK.

SUBMITTED ON PRINTED ARGUMENTS.

ARGUMENT OF MR. B. R. CURTIS

FOR THE PLAINTIFF.

McGILL & WITHEROW, Printers, 1107 E street, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1873.

BULLARD, Trustee,
v.
THE NATIONAL EAGLE BANK OF BOSTON. } No.

This case comes before this court on a certificate of a division of opinion in the Circuit Court of the United States for the District of Massachusetts.

The action was originally brought by Chester I. Reed, trustee of Edmund W. Clapp, a bankrupt. Mr. Reed having deceased, the present plaintiff was appointed his successor in the trust, by the court in bankruptcy, and was admitted by the Circuit Court to prosecute this suit.

It is an action against the bank for refusing to allow a transfer to be made of shares of its stock, the bank justifying its refusal by the assertion that it had a lien on the stock as security for debts due from the bankrupt, by virtue of articles of association of the bank, and a by-law enabling the bank to refuse to allow a transfer of stock by a debtor of the bank. The parties agreed on a statement of facts, which is in the record, and contains, among other things, the articles of association and by-law. The judges in the court below differed in opinion as to what final judgment should be rendered on the statement of facts.

I.

The inquiry is, whether the provision in the articles of association authorizing the directors, by a by-law, to prohibit the transfer of stock owned by any stockholder who may be liable to this association, either as principal debtor or otherwise, without the consent of the board and the by-

law afterwards made by the directors to that effect, justified the refusal of the bank to allow the transfer of the stock.

The act of 1864, section 5, (13 Stats., 100,) enacts, "That associations for carrying on the business of banking may be formed by any number of persons, not less in any case than five, who shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, *not inconsistent with the provisions of this act*, which the association may see fit to adopt *for the regulation of the business of the association and the conduct of its affairs*, which said articles shall be signed by the persons uniting to form the association, and a copy of them forwarded to the Comptroller of the Currency, to be filed and preserved in his office." And the 8th section of the same act empowers the board of directors "*to define and regulate, by by-laws not inconsistent with the provisions of this act, the manner in which its stock shall be transferred.*" On these two provisions the question arises, whether the directors had power to insert in the articles of association a clause authorizing such a by-law as was afterwards made by them, giving a lien on the stock of debtors to the bank.

On this question it is submitted, that the case of The Bank *v.* Lanier, 11 Wallace, 369, is decisive in the negative. In that case the bank was organized under the banking act of 1863, and it adopted a by-law, which had not been repealed, that the stock of the bank should be assignable only on its books, *subject to the provisions and restrictions of the act of Congress*, among which restrictions, touching directly the assignment of stock, was one contained in the 36th section of the act, *that no shareholder should have power to sell or transfer any share so long as he should be liable to the bank for any debt.*

The bank had issued two certificates of stock to one Culver, who had sold the stock to the defendants in error, to whom he assigned the certificates, accompanied by a power of attorney to transfer the stock on the books of the bank. The bank refused to allow the transfer, and the action was brought.

The bank pleaded three pleas, the second of which presented the question whether the bank had a right to refuse the transfer by virtue of the above-mentioned by-law.

On this second plea the court held, "That Congress evidently intended, by leaving out of the law of 1864 the 36th section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were in effect notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell, so did that part of the by-law relating to the subject fall with them." Accordingly this second plea was adjudged bad.

Now, if the omission of the restriction in the act of 1864 put an end to a by-law then existing, which had included that restriction, it must have been because the restriction was inconsistent with the act of 1864. It is manifest that if the act of 1864 was sufficient to destroy an existing by-law, it was also sufficient to prevent the enactment of a new one to the same effect.

There is also another provision of the act noticed by the court in this case for another purpose, but which seems to be directly applicable to the question now under consideration. On page 374 the court say: "And in looking into this act we find these associations expressly prohibited from making any loan or discount on the security of the shares of their own capital stock; and so marked is the policy of Congress on this subject, that it does not allow a bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see that if the power were given to a bank to loan money on the security of its shares, it would imply also a power to become the owner of those shares, and this Congress intended to guard against."

In the case of Brent *v.* The Bank of Washington, 10 Pet., 616, this court said: "Every stockholder who draws

or indorses a note to procure a loan from the bank is bound to know the terms of the charter and by-laws. His signature to the note is an inchoate pledge of his stock for security. His stock gives credit to his name, and the bank grants the loan on its faith." This would seem to be quite decisive that a national bank cannot through a by-law obtain security for the payment of debts by a lien on the stock of the debtor.

It has been suggested that the reason why the court in The Bank *v.* Lanier held the second plea bad was, that there was nothing in the articles of association authorizing the directors to make a by-law restricting the transfer of its stock, but no allusion is made by the court in its opinion to that supposed reason; and section 8 of the act of 1864, which gives the directors power to regulate the manner in which stock shall be transferred, makes no allusion to the articles of association, but expressly provides *that the directors are to regulate it by by-laws not inconsistent with the provisions of the act.*

It has also been suggested that the 5th section of the act authorizes the insertion in articles of association of "any provision not inconsistent with the provisions of this act, which the association may see fit to adopt for the regulation of the business of the association and the conduct of its affairs, which said articles shall be signed by the persons uniting to form the association." As already observed, these articles were not signed by the stockholders, but by the directors. But if they had been signed by the stockholders, it is submitted that a by-law giving the bank a lien upon the stock of its debtors is not a regulation of the business of the association and the conduct of its affairs; it is an attempt to derogate from the rights of the stockholders as such, and to create a lien on their property. Moreover, this provision does not seem to extend to any matter connected with the transfer of stock, because a by-law regulating the manner in which the stock shall be transferred is specially provided for in section 8th. And, further, to assume that such a by-law is "not inconsistent with the pro-

visions of this act," is to assume the contrary of what I understand the court decided in The Bank *v.* Lanier.

In the case of Conkling *v.* The Second National Bank of Oswego, 45 New York, 655, the court of appeals of the State held, in conformity, as they say, with the Bank *v.* Lanier, that the national banks cannot in any way enact such a by-law. This was also the decision of Judge Drummond, in the circuit court for the district of Indiana, in the case of The Evansville Bank *v.* The Metropolitan Bank, reported in the Bankers' Magazine for March, 1872, and of Vice Chancellor Harlan, of Kentucky, reported in the Bankers' Magazine for November, 1873, p. 359.

II.

It appears by the statement of facts that all the debts in question were contracted by the bankrupt before the passage of the by-law. The attempt is to give this by-law a retroactive operation, and by force of it create a lien on the stock of the bankrupt for debts contracted when it was not in existence. If the true ground upon which a bank can acquire a lien on the stock of its debtors by force of a by-law is that stated by this court in 10 Peters, already cited, that "every stockholder who draws or indorses a note to procure a loan from the bank is bound to know the terms of the charter and by-laws; his signature to the note is an inchoate pledge of his stock for security; his stock gives credit to his name, and the bank grants the loan on its faith," it is manifest that the bankrupt, when he signed these notes, could not have notice of, or be supposed to assent to, a by-law not then in existence.

III.

But what seems to me decisive of this case, independent of all other considerations, is, that this stock belonged to the firm of Clapp & Brothers, consisting of Samuel G. Clapp and the bankrupt, and so stood on the books of the bank; and when the partnership was dissolved by the death of Samuel G. Clapp, before the bankruptcy of Ed-

mund W., the stock still remained the property of the firm, to be administered by the surviving partner *through a sale, converting it into money* and applying the proceeds to the payment of the debts of the firm, distributing the surplus, if any, among those entitled to it. And the point I make is this, that if the by-law in question was valid, it was not intended to create a lien upon the property of a firm to secure the individual debt of one of the partners. Such a lien would be a mere fraud, inconsistent with the rights and powers of the firm and its individual members, and wholly beyond the scope of any power possessed by the bank.

The true doctrine on this subject is laid down by this court in the case of Rogers *v.* Batchelor, 12 Pet., 230, where it is held, that "if a creditor takes security for the debt of an individual partner on what he knows to be property of the firm, he is guilty of gross fraud, not only in morals, but in law, as was expressly decided by the king's bench in 1 East, 48, and indeed seems too plain upon principle to admit of any serious doubt."

The terms of this by-law called for no such broad construction as would make it operate fraudulently, or in any degree improperly. Its manifest purpose was to attempt to create a lien for the debt of the owner of the stock, and nothing more. Here the debtor was Edmund W. Clapp: the stock belonged to the firm of which he was the surviving partner.

IV.

But if this by-law was intended to have such operation, then it is in conflict with the bankrupt act. The act of bankruptcy was November 8, 1871, and was known to the bank which held commercial paper of the bankrupt overdue before the by-law was passed, on the 25th of November, 1871, and as amended on 7th of December following. How could the bank *then* obtain a preference over the other creditors of the bankrupt?

B. R. CURTIS,
For the Plaintiff.

No 652

John R. Bullard, Trustee, in Bankruptcy, of Edmund W. Clap,

VS.

The National Eagle Bank of Boston.

DIVISION OF OPINION, CERTIFIED FROM THE CIRCUIT COURT, DISTRICT OF MASSACHUSETTS.

ARGUMENT IN BEHALF OF THE DEFENDANTS,

BY

C. B. GOODRICH.

James F. Cotter & Co., Printers, 14 State Street, Boston.

Supreme Court of the United States.

OCTOBER TERM, 1873.

John R. Bullard, Trustee, under the Bankrupt Act of Edmund W. Clap,

VERSUS

The National Eagle Bank of Boston.

DIVISION OF OPINION, CERTIFIED FROM THE CIRCUIT COURT FOR THE DISTRICT OF MASSACHUSETTS.

QUESTIONS.

"Whether a National Bank, organized under and controlled by the act of 1864, can acquire a valid lien upon the shares of its stockholders, by the articles of association or by-laws, as proved in this case."

"Whether if such articles of association and by-laws, or both, created any valid lien upon the shares of the stockholders in a National Bank organized under the act of 1864, such lien attached to the shares before the time when there was an existing debt from the shareholders to the Bank, *due and unpaid*."

"Whether the National Eagle Bank, upon the facts agreed, is entitled to hold the interest of Edmund W. Clap, in the stock therein mentioned, by way of lien, or security, for all or any of the notes and bills mentioned in the facts agreed."

Argument in behalf of the National Eagle Bank of Boston.

SHORT STATEMENT.

The National Eagle Bank of Boston was organized on the 29th of March, 1865, as a banking association, under the act of 3rd of June, 1864, ch. 106–13, Stat. at Large 99. In the 5th article of association,

the directors are authorized to perform certain specified duties; and generally to do and perform all the acts that it may be legal for a board of directors to do under the act aforesaid; and they shall, also, have the power to make all by-laws, that it may be proper and convenient for them to make, under said act, for the general regulation of the business of the association, and the entire management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association either as principal debtor, or otherwise, without the consent of the board.

At a meeting of the directors, on the 22nd of November, 1871, in pursuance of the 5th article of association, and in the exercise of authority derived from the statute, under which the association was organized, a by-law was proposed, which, at a subsequent meeting, held on the 25th of November, was adopted. This by-law provides "all debts actually due and payable to the bank, days of grace for payment being passed, by a stockholder as principal debtor, or otherwise, requesting a transfer, must be satisfied before such transfer shall be made, unless the Board of Directors shall direct to the contrary." On the 7th of December, 1871, an additional by-law was adopted. *Schedule B.*

Samuel G. Clap and Edmund W. Clap were the holders, as partners, of 160 shares in the capital stock of the bank, the title of which, by the death of S. G. Clap, on the 16th of March, 1870, survived to Edmund W. Clap, the surviving partner. Edmund W. Clap was, on the 19th of January, 1872, decreed a bankrupt, upon the petition of one of his creditors, which was filed on the 12th. On the 10th of February, Chester I. Reed was appointed trustee, under the statute of bankruptcy, of Edmund W. Clap, and as trustee, on the 15th of February, requested the defendant bank to transfer to him, as such trustee, the one hundred and sixty shares, which the bank refused to do, claiming to hold the same as security for the notes, drafts and acceptances of Edmund W. Clap, then due and remaining unpaid, the last of which, a note for $3,000, matured on said 15th of February, the last day of grace. Two of the notes held by the bank matured on the 24th of November, 1871, others matured prior to the 12th, of January, 1872, all of which paper was discounted by the bank in the regular course of business, without any security except such as was derived from the names which appeared thereon.

POSITIONS.

I. The 5th article of association of the defendant Bank, which authorized by-laws regulating the transfer of shares in the capital stock, was a lawful exercise of the authority conferred upon those who became parties to the articles of association. It is in harmony with the act under which the defendants were incorporated, and not inconsistent with any of its provisions.

The articles of association constitute a contract by the several original shareholders, each with every other, and when followed by an organization certificate, approved by the comptroller of the currency, they constitute the charter of the Bank. By the 12th section of the act of the 3rd of June, 1864, it is declared "those who purchase of the original subscribers succeed to the rights and liabilities of the prior holders."

The subscribers to a banking association severally agree to contribute certain sums of money, in which, when paid in, all the subscribers acquire an interest. Each subscriber exercises his right as owner to contract as to the terms and conditions, upon which, and the uses to which his money, when paid in, shall be applied. These rights of contract and of ownership will be protected, unless exercised in a manner to constitute a distinct and clear violation of some well established and clearly defined law.

If the articles constitute a contract between the parties thereto, as supposed, it is submitted that the subscribers and purchasers under them, of shares in the capital stock, are bound by the articles and cannot resist or avoid a compliance therewith by withdrawing their portion of the capital stock, by way of debts due and unpaid, from them to the corporation.

The United States cannot annul or vacate the charter of a banking association because an article similar to the one in question may have been adopted, or, by legal proceedings, cause it to be stricken out; much less can this be done, directly or indirectly, by a shareholder.

If it is competent for a shareholder, notwithstanding his contract, to resist and avoid some one or more of the articles of association, to which he is a party, it is incumbent upon him to show clearly and conclusively that such article or articles are inconsistant with the act of the 3rd of June, 1864, which it is submitted cannot be shown.

The 5th Section of the act of the 3rd of June, 1864, provides for the formation of banking associations under articles of association which shall specify, in general terms, the object for which the association is formed; which articles may contain any other provisions not inconsistent with the provisions of this act *which the association may see fit to adopt* for the regulation of the association and the conduct of its affairs. These terms are broad and defer to the will of the shareholders, who are clothed with a large discretion, controlled only in its exercise by an inability to adopt any provision clearly inconsistent with the act. An article authorizing a prohibition of the transfer of a portion of the capital stock by a shareholder, liable as principal debtor, or otherwise, to the corporation, is within the terms of this section. It is a matter appertaining distinctly to the regulation and conduct of the affairs of a banking association. The eighth section of the act confers upon the board of directors, substantially, all the corporate powers, except the election of directors, and provides that the board of directors of an association shall have power to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred, its directors elected or appointed, its property transferred, its general business conducted, its privileges exercised and enjoyed.

The 12th section provides that the capital stock shall be divided into shares, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer, shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder.

This power, to regulate the transfer of shares, cannot be confined to a mere formal mode of transfer without reference to the rights and interests of co-shareholders and of the corporation. An article of association which prevents a transfer of a proportional part of the capital stock by a shareholder who is indebted to the corporation, is not inconsistent with either of the sections of the act to which reference has been made.

The 5th article of association is in harmony with the 11th section of the act which provides that "no stockholder whose liability is *past due and unpaid*, shall be allowed to vote."

This provision was for the benefit of the corporation, and was designed to have some effect.

This provision is useless, if a shareholder who is liable to the bank for a debt past due, and unpaid, can transfer his interest in the capital stock, to a transferee and thereby confer upon him a right to vote; a right greater than he possessed. This shows that the rights of a shareholder are not absolute, they are limited by, and subject to the articles of association, and all by-laws which are permitted under these articles. The 15th section of the act, provides "if a shareholder or his assignee fail to pay instalments on the stock, the directors may sell it at public auction. If there shall not be any bidder the stock shall be forfeited and sold within six months. If not sold, shall be cancelled, and deducted from the capital stock, and if such reduction shall reduce the capital below the minimum of capital required by the act, the capital shall be increased within thirty days, in default of which a receiver may be appointed to close up the business of the association. This section shows the most sedulous care and intention that the entire capital stock shall at all times be preserved.

The 38th section provides "that no association, *or member thereof*, shall during the time it shall continue its banking operations withdraw, or permit to be withdrawn, either in form of dividends, *or otherwise*, any portion of the capital. If losses shall be sustained, equal to the dividend profits on hand no dividend shall be made." If a shareholder who is liable to the banking association of which he is a member, *for a debt due and unpaid*, can be allowed to withdraw, directly or indirectly his proportion of the capital stock, it is to the extent of his interest as a member of the association, withdrawn to the injury of creditors and his associate shareholders. A certificate of stock is not a negotiable instrument; it is merely a certificate that the holder has an interest in the capital stock, which is proportional and in the ratio which his interest bears to the whole. A certificate of stock or shares is no better than an entry upon the books of the bank that *A. B.* is interested therein to the extent of one-tenth or one-twentieth, as the case may be, of the capital stock.

The 12th section of the act cited *supra* provides that the shareholders shall to a certain extent be personally liable for the debts of the association. It is therefore important to the shareholders, that a shareholder liable to the bank for a debt due and unpaid, should not withdraw or transfer his proportion of the capital stock to the injury of his associates.

II. The by-law which was proposed on the 22nd of November, 1871, and adopted on the 25th, was authorized by the 5th article of association; it is not inconsistent with any provision of the act 3d June, 1864.

In addition to the sections cited and relied upon, it is submitted that the 35th section of the statute authorizes the 5th article of association, and the by-law of the 25th of November, which was adopted to carry it into effect. This section is in part prohibitory, and in part it constitutes a concession and grant of authority. It is prohibitory, so far as it provides that no association shall make any loan or discount on the security of the shares of its own capital stock; it is a grant of authority insomuch as it provides that a bank may take such security when necessary to prevent loss upon a debt previously contracted in good faith. The security which the bank is authorized to take does not refer to legal proceedings by attachment, which the bank may adopt under its general authority to sue. It evidently refers to security acquired by the consent of the shareholder, which in the case at bar, was given in the 5th article of association. This article is, and was a contract between the original subscribers, binding upon their successors. Without reference even, to the 5th article of association it was competant for the directors under the general authority conferred upon them to manage the business and affairs of the corporation, to adopt the by-law in question.

Angell on Corporations, section 355, "where the charter of a corporation authorized to lend money, enacts that the stock shall be assignable on the books of the corporation under such regulations as the board of trustees shall establish, it is competent for the trustees to enact a by-law that no stockholder shall be permitted to transfer his stock while he is in default."

See act 3rd June, 1864, *sec.* 8 *and* 12,

Knight v. Assignee the Old National Bank, a decision of Mr. Justice Clifford, fully sustains the views here presented. (*Rhode Island, June Term*, 1871.)

Bank v. *Lanier*, 11 Wallace, 369. This case it is respectfully submitted, does not contravene the positions or principles upon which the defendant corporation relies. The court decided that a by-law

which adopted a particular provision of the bank act of 1863, which was obligatory without such adoption, was repealed by a repeal of the statute. The court, upon page 376, used this language, "in the absence of any action taken by the bank on the subject since the new law (act of 1864) went into operation, the fair inference is that this by-law is used as an after thought to serve the purposes of this suit." It is evident that in this case the court did not determine upon the validity of an article of association and by-law to carry it into effect, such as are presented in the case before the court.

Exparte, Bigelow, 2 *Benedict, C. C.* 469.

Child v. *Hudson Bay Company*, 2, *Peere Williams*, 207. The Hudson Bay Company, by its charter, was empowered to make by-laws for the government of the company, and for the management and direction of their trade. They made a by-law, "that if any of their members should be indebted to the company, his stock in the company should be in the first place liable to the debts which such member should owe the company." One of the members became bankrupt, who was indebted to the company, his assignee brought suit to obtain his interest. *Lord Chancellor*. This is a good by-law; the legal interest of all the stock is in the company who are trustees for the several members, and may order that the dividends to be paid shall be under particular restrictions or terms.

Fisher v. *Essex Bank*, 5 *Gray*, 373, 379. Acts of incorporation are deemed public acts. Their provisions constitute laws by which all courts and magistrates, all citizens and subjects are bound

Union Bank of Georgetown v. *Laird*, 2 Wheaton 390. The charter provided that the shares should be transferred upon the books of the bank according to rules established by the president and directors, and all debts due and payable to the bank by a stockholder must be satisfied before a transfer can be made, unless the president and directors direct the contrary.

Brent v. *Bank of Washington*, 10 *Pet.* 596, 615. This case sustains the doctrine of the case cited from 2 Wheaton. The court add, "every stockholder who draws or indorses a note to procure a loan from the

bank, is bound to know the terms of the charter and by-laws; his signature to the note is an *inchoate pledge* of his stock for security."

In the case at bar, the subscribers to the articles of association, are bound thereby, and by their signatures, consented in advance to any subsequent by-law which might be adopted in conformity with the articles.

1 *Deacon on Bankruptcy.* 500, 2*d Edi.* *Payments in pursuance of a previous agreement.* So, even if the transaction amounts in reality to the preference of a creditor, yet if such preference be only consequential to the contract,—as, if the payment is made, or the act is done, in pursuance of a prior agreement between the parties,—the creditor in this case will not be liable to refund to the assignees.

Harris, assignee v. *Pickett*, 4, *H. & N.* 1. A trader procured an advance, and at the time verbally agreed to give a bill of sale of all his property if called upon to do so. Subsequently he executed such bill of sale in pursuance of the original agreement. *Held*, not an act of bankruptcy because it was in pursuance of a prior agreement.

Harman v. *Fisher*, *Cowper* 124–125. If a payment were made, or an act done, in pursuance of a prior agreement, it would be good. In such a case a preference which is only consequential, not fraudulent.

Exparte Copeland, 3, D. & C. 199.
Exparte Prescott, 3, D. & C. 230.
Where the original intention of the parties was to appropriate property to a certain purpose, in such a transaction bankruptcy would not affect that intention nor deprive third parties of the benefit of it.

Kirkman v. *Shaweross*, 6 *D. & C.* 14. A lien may be created by agreement between the parties, where no lien would exist by operation of law.

Upon the provisions of the act to which reference has been made it is respectfully submitted that the 5th article of association was a rightful exercise of authority; it constitutes a part of the charter; the shareholder by his subscription for, or purchase of stock, assents thereto. It must be conceded that the bank has authority to take its own shares in payment, or as security, of a debt previously contracted in good

faith, if necessary to prevent loss. Upon the same reason, it may pass a by-law which shall create an equitable lien upon the shares of a stockholder, who suffers his debt to become due and unpaid, the by-law taking effect, only upon a default in payment at the day, prior to which the stockholder is not prohibited by the by-law of the 25th of November, to transfer his stock at pleasure, paying his obligations which had matured at the time of the proposed transfer. On the 26th of November, so far as the by-law under consideration is concerned, Clap by paying the two notes which matured on the 24th of November, might have transferred his stock.

Many of the provisions of the Act of June, 1864, were designed to protect and preserve unimpaired, so far as practicable, the capital stock of the banking associations established under it.

In section 28, act of 1864. A banking association is allowed to take a mortgage of land *by way of security for debts previously contracted;* it may also take a conveyance of land in satisfaction of debts contracted in the course of its dealings.

III. The loan to Clap, by discount of the notes and bills held by the defendants, was not made on the security of the shares, but upon the personal credit and responsibility of the parties; it follows that the by-law of November 25th, 1871, is not a violation of section 35 of the Act of the 3rd of June, 1864, which prohibits a loan by a bank upon the security of the shares of its own capital stock. It is submitted that the by-law is not inconsistent with any other provision contained in the statute.

A. The article of association under which the by-law was made, was approved by the comptroller of the currency; by the act, he is the officer of the government charged, in the first instance, with the duty of making an examination of the articles of association, and of the organization certificate, preliminary to his consent, that the association may commence the business of banking. If it be conceded that his action of approval is not binding upon the court, it will be respected unless the articles which he has approved, or some one of them, are clearly inconsistent with the provisions of the act.

The comptroller acts under the direction of the Secretary of the Treasury, in whose department, the comptroller is the head of a bureau.

IV. The Statute of 2nd of March, 1867, regulating bankruptcies, does not, in terms or by implication, repeal the act of 3rd of June, 1864, and was not designed to interfere with it. It does not, in terms, repeal any prior statute. This statute cannot be regarded as an exercise of the right to repeal the act of 3rd of June, 1864, which is reserved to Congress in section 64 of the act.

1 *Ridgeway, P. C.* 448, *Note A.* In Hayden against Rivers. In chancery, it was held, "the bankers' act was not repealed by the bankrupt laws."

Hayden v. *Carroll*, 3 Ridgeway, P. C. 592, 600.

3 Chitty Equity Index, 2795, (5).

Wood v. *Owens*, 1 Cranch, 239.

"A deed executed on the 30th of May, 1800, but not acknowledged until the 14th of June following, is to be considered as made the 30th of May, and is not within the provisions of the statute of bankruptcy, passed 4th April, 1800, which came into effect on the 1st of June, 1800, a commission of bankruptcy having issued against the grantor on the 12th of July, 1800."

A. The suspension of payment by Clap upon his commercial paper, had no effect upon the rights or powers of the defendant bank to pass any by-law, which, under its articles of association, was within its corporate capacity; and although after such suspension, he might at any time before the adoption of the by-law on the 25th November, 1871, have transferred his stock, he could not subsequently without the consent of the board, unless upon the payment of his matured and unpaid paper. Two of the bills matured and were unpaid on the 24th of November, 1871, the day before the by-law was adopted; four matured subsequent to the 25th of November, the date of the by-law, and before the 12th of January, 1872, at which time a petition in

bankruptcy *in invitum* was filed. The others matured prior to any request for a transfer.

Parker v. *Muggride*, 2 *Story*, *Rep.* 334.

An attachment was made and the parties agreed that the suit should be continued, and that the attachment should remain for the protection of the plaintiff. The suit was continued and judgment was rendered for the plaintiff subsequent to the bankruptcy of the defendants. This agreement was regarded as giving to the plaintiff an equitable lien by contract, which was not destroyed by the bankruptcy of the defendant. Although the Bankrupt Act of 1841 contains an express saving of certain liens, etc.; the court say, "indeed, if there had been no such saving in the act, the liens, mortgages and other securities within the purview of the saving, would have been saved by mere operation of law, from the natural intendment of the statute which did not mean to disturb existing vested rights and interests in property."

Mitchell v. *Winslow*, 2 *Story*, *Rep.* 830. Assignees in bankruptcy, except in case of fraud, take only such rights and interests as the bankrupt himself had, and could claim and assert at the time of his bankruptcy, and they are affected with all the equities which would affect the bankrupt himself if he were asserting those rights and interests." 2 *Story*, *Equity Juris.* sec. 1038.

B. There is not any averment or proof that Clap has committed any fraud, or that he requested or advised the bank to pass any by-law; his consent, in this respect, had its origin in the original subscription of the party from whom he made his purchase of the stock, under which he became bound by the articles of association, and the by-laws adopted, in conformity therewith.

V. The assignee of Clap took his property as he held it, on the 12th of January, 1872. The assignee or trustee, under the act has no other or better title, or estate than the debtor, and is subject to all the rights and equities subsisting at that time, in any creditor of the debtor: the

only exception is a right to avoid fraudulent sales, fraudulent preferences, and attachments on mesne process, made within four months next preceding the commencement of proceedings in bankruptcy.

Ex parte, *Newhall*, 2 *Story*, *Rep.* 363. "The rule in bankruptcy is clear that the assignee takes the property of the bankrupt subject to all the rights and equities of third persons, which are attached to it in the hands of the bankrupt."

Winsor v. *McLellan*, 2 *Story*, *Rep.* 493. "The assignee in bankruptcy, except in cases of fraud, stands in no better situation than the bankrupts themselves."

Fletcher v. *Morey*, 3 *Story*, *Rep.* 555. "The assignee in bankruptcy takes the property and rights of the bankrupt, subject to all the liabilities and with all the rights that would attach to them in the hands of the bankrupt; the only exception is in the case of fraud."

The filing of a petition in bankruptcy, by or against the debtor, followed by a decree, fixes the time at which the rights, property and estate of the debtor, transferable to an assignee, must be ascertained. The right of the assignee to recover from the grantee, property fraudulently conveyed; or to recover money paid to a creditor by way of fraudulent preference, does not change the time at which the right of the assignee to the property of the debtor is to be ascertained.

Ex parte, *Plant* 4, *Deacon & Chitty*, 160, 169. *Sir G. Rose.* "The assignees therefore take the interest of the bankrupt with all the incidents relating to the shares, and subject to all the restrictions contained in the deed of settlement.

Bankrupt Act, 2 *March*, 1867, *ch.* 176, 14 *Stat. at Large*, 517, *sec.* 14. As soon as an assignee is appointed and qualified, the judge or register shall assign the property of the bankrupt to his assignee, and such

assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon by operation of law the title to all such property shall vest in said assignee.

Sec. 16. The assignee shall have the like remedy to recover all said estate, debts and estate in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered, and no assignment had been made. If *at the time* of the commencement of proceedings in bankruptcy, a suit is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee, he may prosecute the suit.

Sec. 20, makes provision for the set off of mutual debts, and credits, —*provided*, that no set off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him *after the filing the petition.*

Sec 32. The discharge given to a bankrupt relates to the day on which the petition for adjudication was filed by or against him.

These sections declare in distinct terms that the property of the debtor passes as it exists on the day the petition is filed. A debtor being a banker, merchant or trader, may be adjudged a bankrupt upon a petition against him, if he suspends payment of his commercial paper for a period of fourteen days.—*Act of* 1867, *sec.* 39. This suspension of payment does not control or fix the time at which the property of the debtor passes; it is not, therefore, an act of bankruptcy in the sense applied to the term in those systems of bankruptcy which fix upon an act of bankruptcy as the time from which the property passes, if such act is followed by an adjudication.

VI. The by-law of December 7th, 1871, which provides "and no person indebted to the bank shall be allowed to sell or transfer his or her stock without the consent of a majority of the directors, and this whether liable as principal or surety, and whether the debt or liability be due or not," was prior in point of time to the title of plaintiff, and the only question which can arise thereon is whether it is inconsistent and incompatible with the 35th section of the statute.

Decision of Mr. Justice Clifford, supra.

A. The mere fact of a discount made by the bank, after the adoption of such a by-law, does not operate a transfer or pledge of the shares held by the borrower. The authority conferred upon the directors by this by-law, is to be exercised at their election, at the time a transfer is proposed; the by-law does not operate at the time of a discount *proprio vigore*, to create a lien or pledge in favor of the bank. It is like a constitutional provision, which does not operate by its own force, without legislative action to carry it into effect.

☞ *Graves* v. *Slaughter*, 15 Peters, 449, 500, 501. The language of the Constitution obviously points to something more to be done, and looks to some future time, not only for its fulfilment, but the means by which it was to be accomplished. Legislative provision is essential to carry into effect the object of the prohibition.

B. In the case at bar, it is clear that the discounts, by the defendant bank to Clap, were not made upon the security of his stock, or shares in the bank.

VII. The construction of the bank act of 1864 must be deduced from its provisions, which cannot be resisted or defeated by any reference which may be made to the act of 1863.

The most important change made by the act of 1864, consists in a transfer, substantially, of the corporate powers from the shareholders to the directors; in some respects it diminishes the authority which the comptroller had under the act of 1863; and enlarges the authority of those by whose agreement "articles of association" for the business of banking may be established. The act of 1863, was, in some particulars, somewhat crude in its language; its provisions were not so symmetrical, in the order of arrangement, as they are in the act of 1864.

The sixth section of the act of 1863, provides for a certificate, and gives the provisions which it shall contain. The same section, near its close, requires that a copy of the articles of association shall be transmitted to the comptroller of the currency, but it does not say what these articles shall contain.

The eleventh section of the act of 1863, authorizes banking associations to loan money on real and personal security in the manner

specified in their articles of association; it does not say what these articles shall contain. The fifth section of the act of 1864 provides for articles of association which shall specify in general terms the object for which the association is formed, and may contain any other provisions not *inconsistent with the provisions of this act* which the association may see fit to adopt for the regulation of the business of the association, and the conduct of its affairs. From this provision it is clear that the articles of association under the act of 1864 are not to be regulated by the act of 1863.

The eleventh section of the act of 1863, authorizes by-laws, *approved* by the comptroller of the currency, not inconsistent *with the laws of the United States*, or the provisions of this act, for the election of directors, the management of its property, the regulation of its affairs, and for the transfer of its stock.

The eighth section of the act of 1864, near its close provides, "and its board of directors shall also have power to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred, its general business conducted, and its privileges shall be exercised and enjoyed.

Under this section the approval of the by-laws by the comptroller of the currency is not required. The provision in the act of 1863, that the by-laws shall not be inconsistent with the laws of the United States, is omitted in the act of 1864. Notwithstanding this omission, it must be conceded that associations under the act of 1864, are bound by such laws, so far as they are applicable.

The 36th section of the act of 1863, is not in so many words contained in the act of 1864; its omission in part, or altogether, cannot destroy the 5th section of the act of 1864, which provides that the articles of association may contain such provisions, not inconsistent with the act as the association may see fit to adopt. An examination of the 36th section of the act of 1863, will show that its omission has no bearing upon the question under consideration. It provides that the stock shall be divided into shares, and shall be assignable on the books of the association, in such manner as the by-laws shall prescribe. No shareholder shall have power to sell or transfer, any share held by him in his own right, so long as he is liable to the association for any debt which shall have become due and remain unpaid, and he shall not receive dividends so long as such indebtment shall continue, but such dividends shall be retained by the association and applied to

the discharge of the debt, and no stock shall be transferred without the consent of the directors, while the holder thereof is thus indebted.

The act of 1864 does not say, that a shareholder shall not receive dividends, when he is liable to the association for a debt due and remaining unpaid. Notwithstanding this omission it cannot be doubted that a banking association may apply any dividend due to a shareholder in satisfaction of any debt against him which is due and remains unpaid at the time application is made for the dividend. It is respectfully submitted that the defendant bank has an equitable interest, by the way of security, in the stock of E. W. Clap, which stands in the name of Clap & Brother, consisting of S. G. and E. W. Clap, and to protect and sustain this interest may refuse to permit a transfer of the shares until it is satisfied by payment. The interest of E. W. Clap, at the death of his brother was prima facie one half, as surviving partner he has the entire legal interest.

If it was competent for the National Eagle bank, of Boston, to adopt its 5th article of association and to pass the by-law of 25th November, 1871, in execution thereof and in pursuance of the power reserved by the consent and contract of the original subscribers, they are binding and obligatory, upon all the shareholders alike, and cannot be defeated or rendered inoperative, by any subsequent change of the condition or status of one or more of the shareholders. It is not inequitable to require that a shareholder shall pay his matured and unpaid debts to a banking association before he shall be permitted to withdraw his proportion of the capital stock, by a transfer or otherwise. It is not inequitable to require a shareholder to adhere to the articles of association to which he has assented, and is a party. If this be so, his assignee or trustee under the statute of bankruptcy, stands in no better condition. Every shareholder, is to a certain extent liable to pay the debts and obligations of the association, and therefore has a direct legal and equitable interest that the capital stock shall not be withdrawn or diminished, directly or indirectly, by the act of any other shareholder. Every creditor of the association has an interest that the capital stock to which he trusted, shall not be withdrawn.

VIII. The defendant bank has a security upon the 160 shares, standing in the name of Clap and Brother, under the by-law of November

25th, 1871, for the entire amount of the indebtment of E. W. Clap, on the 15th of February, 1872, at which time Clap, by his trustee and assignee, proposed to transfer the shares in question. The right, in this respect, is the same as it would have been if Clap had not been a bankrupt, and had requested a transfer, or withdrawal, of his original interest in the capital stock of the association, he being at the time liable to the association, for debts due and unpaid. The only exception, if any, which can be taken to this, is that one note of $3000, which was due on the 15th of February, 1872, the last day of grace, cannot be considered as a debt due and unpaid on the 15th of February, when Clap, through his trustee, requested a transfer.

The defendant corporation is also entitled to hold the shares under the amended by-law of December 7th, 1871, which, as has been shown, cannot be regarded as a violation of the 35th section of the bank act of June 3rd, 1864.

The time at which a by-law is passed is immaterial, if it is adopted prior to the time at which the shareholder proposes a transfer; most certainly this is true in relation to by-laws made in execution of the articles of association.

Lockwood and others v. *Mechanics' National Bank*, 9th Rhode Island Rep., 308. This case sustains the positions and principles which have been urged in support of each of the by-laws which appear in the case at bar. The case was argued by eminent counsel; the opinion of the court is full and evidently well considered.

It is most respectfully submitted that the three questions upon which the Circuit Court has certified a division of opinion should be answered in the affirmative. It is submitted that the National Eagle Bank of Boston, under the circumstances stated in the facts agreed, had a right to retain the stock, as security, and to refuse to permit a transfer of the same.

C. B. GOODRICH,

For the National Eagle Bank of Boston.

Argument of the Plaintiff received since the above was printed.

1. No question as to the existence of the defendant bank as a corporation was made in the court below; and such

question has not been certified.
The writ avers that the defendants were organized as a corporation under the laws of The United States. E. W. Clap and his trustee are estopped to say no corporation. The organization was had under the act of June 3, 1864, section 44.

2. As stated in the argument of defendant, the time at which the by-law was adopted is immaterial. The article of association was prior to any loan to Clap.

3. The trustee has joint assets more than sufficient to pay the partnership debts. (Record page 2. near the close.) The doctrine of the case 12 Peters 230, has no application to the questions certified.

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